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No. 76-621

In the Supreme Court of the United States

OCTOBER TERM, 1976

KEITH NOWICKI, d/b/a K & F FOOD MARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General,
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Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 536 F. 2d 1171. The opinions of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1976. A petition for rehearing was denied on August 5, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on November 2, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals applied the proper standard in reviewing the period of disqualification imposed by the Secretary of Agriculture upon a food retailer for violations of the Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U.S.C. 2011 *et seq.*

STATUTORY PROVISIONS INVOLVED

The statutory provisions and regulations involved are set forth in the appendix to the petition (Pet. Apps. E and F).

STATEMENT

Petitioner's retail food store was disqualified from participation in the food stamp program by the Secretary of Agriculture for violations of the Food Stamp Act of 1964.[1] Pursuant to the procedures specified in 7 U.S.C. 2022 and 7 C.F.R. Parts 272 and 273, the Regional Office of the Department of Agriculture informed petitioner in January 1971 that there was reason to believe that petitioner had violated the food stamp regulations and that he could reply, either orally or in writing, submitting information, explanations, or evidence concerning the incidents. Petitioner appeared in person and denied the violations (Pet. App. 9-10). Thereafter, petitioner was sent a notice of disqualification, stating that petitioner was disqualified for one year as a result of the violations charged (Pet. App. 1-3).[2]

Petitioner submitted a written request for review, and argument in support of his position. A food stamp review

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[1]Petitioner was charged with exchanging nonfood items for food stamps in violation of 7 U.S.C. 2013(a) and 7 C.F.R. 1600.2(i) and 1602.2(b) (1971), now 7 C.F.R. 270.2(s) and 272.2(b), and giving incorrect change in violation of 7 C.F.R. 1602.2(b) (1971).

[2]7 U.S.C. 2020 authorizes disqualification of participating food stores for violations "for such period of time as may be determined in accordance with regulations issued pursuant to this [Act]."

Regulations provide for disqualification "for a reasonable period of time, not to exceed three years." 7 C.F.R. 272.6(a).

The Department of Agriculture (Food and Nutrition Service) has issued further administrative guidelines setting forth criteria for determining particular periods of disqualification within the three-year range specified in the regulations. See FNS (FS) Instruction 744-9 (March 13, 1970), a copy of which has been lodged with the Court.

officer of the Food and Nutrition Service concluded, in a letter dated April 27, 1971, that the violations did occur, that there were no extenuating circumstances, that the violations were committed with full knowledge of, and complete disregard for, the food stamp program regulations, and that the violations were serious in nature. The officer sustained the determination of violation and the one-year disqualification period (Pet. App. 4-7).

Petitioner thereafter filed an action in the United States District Court for the Northern District of Indiana pursuant to 7 U.S.C. 2022, challenging the disqualification of his store. That statute authorizes "a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." The district court found that the evidence presented to it established that petitioner had violated the regulations, since petitioner's store clerk admitted that she sold noneligible items for food stamps (Pet. App. 14-15). The district court also found that the penalty was within the limits prescribed by regulation and therefore valid; the court observed that since the penalty was within the prescribed limits, the length of the disqualification was not before the court, citing *Martin* v. *United States*, 459 F. 2d 300 (C.A. 6), certiorari denied, 409 U.S. 878 (Pet. App. 15).

On the basis of the subsequent decision of *Cross* v. *United States*, 512 F. 2d 1212 (C.A. 4), the district court *sua sponte* suspended its judgment and thereafter conducted a hearing at which it accepted evidence on the question of the period of disqualification. The court determined that the period of disqualification imposed, although within the limits of the regulations, was "too harsh a sanction" and modified its prior order by reducing the disqualification period from one year to 120 days (Pet. App. 16-17).

Upon appeal by the government, the court of appeals reversed the district court's judgment reducing the period

of disqualification. The court of appeals found the district court's judgment shortening the period of disqualification was an "impermissible intrusion into the administrative domain under the circumstances present here" (Pet. App. 30).

ARGUMENT

1. Petitioner incorrectly contends that this case presents a conflict with the decisions of other courts of appeals in "identical cases" (Pet. 7). It is true that the four courts of appeals[3] that have considered judicial review of periods of retailer disqualification from participation in the food stamp program have reached conflicting conclusions concerning several aspects of review. But the conflicts that may exist are not squarely presented in this case.

a. The court of appeals held that in reviewing the period of disqualification the district court should have applied the standard of review set forth in *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, which held that the Secretary's choice of sanction for violation of the Packers and Stockyards Act "was not to be overturned unless the Court of Appeals might find it 'unwarranted in law or . . . without justification in fact . . .' " (411 U.S. at 185-186), and that a "court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy' " (*id.* at 189). The court of appeals concluded that "[h]aving found that the Secretary here made an allowable judgment in his choice of remedy, that the sanction imposed bears a reasonable relationship to the goal the legislation was intended to accomplish, and that the sanction was within the limits of the applicable statute and was valid" (Pet. App. 30), it was compelled to reverse the district court and to permit the

[3]See *Martin* v. *United States*, *supra*, *Cross* v. *United States*, *supra*, and *Goodman* v. *United States*, 518 F. 2d 505 (C.A. 5).

administratively determined period of disqualification to stand.

Contrary to petitioner's assertion (Pet. 8-10), the standards of review adopted by the Fourth Circuit in *Cross* v. *United States*, *supra*, and the Fifth Circuit in *Goodman* v. *United States*, *supra*, do not differ markedly from that enunciated by the court of appeals below. In *Cross*, the Fourth Circuit also relied upon *Butz* v. *Glover Livestock Commission Co.*, *supra*, stating that the Secretary's choice of sanction is not to be overturned unless it is " 'unwarranted in law or . . . without justification in fact' " and concluding that this standard is the same as the Administrative Procedure Act standard that requires a court to determine whether agency action was "arbitrary or capricious." The Fourth Circuit concluded that the Secretary's action could be overturned only where "it may be fairly said * * * that the Secretary has abused his discretion by acting arbitrarily or capriciously." 512 F. 2d at 1218.

The Fifth Circuit in *Goodman* approved the Fourth Circuit's statement of the standard to which trial courts must adhere when reviewing the propriety of a sanction, and quoted from that opinion: "To be 'valid', a sanction must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact" (518 F. 2d at 511).

While the Seventh Circuit has stated the standard somewhat differently from the Fourth and Fifth Circuits, all explicitly rely on *Glover Livestock*. It is not clear whether their different statements of the standard reflect the adoption of standards that are substantively different in fact. Apparently no court of appeals has yet disapproved a sanction imposed by the Secretary for a violation of the Food Stamp Act, and therefore it cannot be said that the courts of appeals would reach different results on the same

facts.[4] Accordingly, at present there is no reason to conclude that the circuits have enunciated inconsistent standards or that there is a conflict between the circuits on this issue.

b. There does appear to be conflict between the circuits concerning the proper disposition of a case if the court disapproves the period of disqualification.[5] This case does not present this issue for resolution, however, since the court of appeals upheld the period of disqualification imposed by the Secretary.

c. The only other significant issue concerning judicial review on which several of the circuits appear to disagree at this time concerns the authority of the district court to hear new evidence concerning the appropriateness of the period of disqualification. The Fourth and Fifth Circuits in *Cross* and *Goodman* remanded to the district court to hear new evidence on the issue of the period of disqualification. The Sixth Circuit in *Martin* construed the trial *de novo* provisions of 7 U.S.C. 2022 to apply only to the fact of violation and presumably would not find the trial court

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[4]The Sixth Circuit in *Martin* v. *United States*, *supra*, stated that the statute authorizes a review only on the merits of the case, and not on the period of disqualification (459 F. 2d at 301). But insofar as the position taken by the Seventh Circuit here is more favorable to petitioner than the position apparently taken by the Sixth Circuit, petitioner cannot be heard to complain of any conflict between those two courts.

[5]In *Cross*, the Fourth Circuit stated that a district court may, if it finds that the Secretary acted arbitrarily or capriciously, modify the penalty, but that in doing so the court would be required to follow the guidelines set by the Secretary. In *Goodman*, the Fifth Circuit stated that in such circumstances the district court may prescribe such period of qualification as is in accord with the law and the evidence. In contrast, the Sixth and Seventh Circuits, in *Martin* and this case, respectively, apparently take the view that disapproval of a sanction would require a remand to the Secretary. But no circuit has adopted the position espoused by petitioner (Pet. 11) that a district court itself may revise sanctions in the absence of a finding that the period of disqualification was arbitrary or capricious or otherwise in excess of authority.

authorized to take new evidence relating to the period of disqualification. The court of appeals in the present case does not appear explicitly to have addressed this issue. The district court had provided petitioner an opportunity to present new evidence, but that court did not state whether its decision was affected by any new evidence presented to it. The court of appeals did not discuss the district court's action in taking new evidence, and it did not indicate in its opinion the record on which it determined the agency action to be valid. Since the court of appeals did not clearly state its position on the question, this is not an appropriate case for resolution of any disagreement between the circuits on this issue.

2. The court of appeals correctly sustained the period of disqualification in this case. The district court had improperly substituted its judgment as to the appropriate period of disqualification, and the court of appeals correctly reversed.

The sanction imposed by the Secretary for petitioner's serious violations plainly bore a reasonable relationship to the goals of the legislation and was within the period allowed by statute and regulations. Discretionary determinations satisfying these criteria are not arbitrary or capricious and must be sustained. As the Court stated in *Glover Livestock*, " 'the relation of remedy to policy is peculiarly a matter for administrative competence.' *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 112 (1946)." 411 U.S. at 185.

Petitioner nevertheless contends (Pet. 11) that the statute here, unlike that involved in *Glover Livestock*, contemplates that the district court will substitute its own judgment as to the proper period of disqualification for that of the Secretary. But the relevant statute, 7 U.S.C. 2022, restricts the district court to a review of the "validity" of the period of disqualification. Discretionary deter-

minations by the Secretary that bear a reasonable relationship to the goal of the legislation and are within the period allowed by statute and regulation are, we submit, "valid" under that statute. The further inquiry by the district court that petitioner urges would concern not the validity or invalidity of the agency action but the wisdom or appropriateness, in the district court's view, of the particular choice of sanction. By limiting review to the question of validity, Congress clearly intended that the administrator would not be subject to judicial second-guessing with respect to such judgmental considerations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.